IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE,

Petitioner,

v.

WILDERNESS SOCIETY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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Interest of *Amicus Curiae**

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to black persons suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own

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* Letters of consent from counsel to the filing of this brief for the petitioners and the respondents have been filed with the Clerk of the Court.

behalf. The charter was approved by a New York court, and authorizes the organization to serve as a legal aid society and to receive court-awarded counsel fees. The NAACP Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

The Legal Defense Fund has a vital interest in the firm establishment of the "private attorney general" basis for the award of counsel fees in public interest litigation, and its attorneys have brought to this Court a number of cases dealing with the issue, including *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); *Northcross* v. *Board of Education of Memphis City Schools,* 412 U.S. 427 (1973); *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974); and *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission,* No. 74-543 (petition for writ of certiorari pending). In the last ten years, since the passage of the first attorney's fees provisions in Title II and Title VII of the Civil Rights Act of 1964, the Legal Defense Fund has been able to expand significantly the scope of its program. The recovery of attorneys' fees for work done by lawyers employed by the Fund in cases involving employment, public accommodations, school desegregation, fair housing, voting rights, and other constitutional and statutory rights, provides a vitally important resource that helps to make the Fund's work possible. Although petitioner in this case disclaims any application of its arguments to civil rights cases, and does not challenge the validity of the private attorney general rule itself, its final argument, that counsel fees cannot be awarded to attorneys employed by charitable organizations would also

bar the legal Defense Fund from such awards. Thus, the Fund has a direct interest in the outcome of this case.

ARGUMENT

There Is No Bar to the Award of Counsel Fees for Work Done by Attorneys Employed by a Charitable Organization Under the Private Attorneys General Rule.

Petitioner urges, in the alternative, that the court below lacked discretion to award counsel fees in the instant case because the plaintiffs are charitable organizations established to protect the environment, and because plaintiffs' counsel were provided by other charitable organizations established to provide free legal counsel in cases such as this.

This contention is not a novel one; it has been considered and rejected by five courts of appeals. *Jordan* v. *Fusari*, 496 F.2d 646, 649 (2d Cir. 1974); *Brandenburger* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974); *Fairley* v. *Patterson*, 493 F.2d 598, 606-07 (5th Cir. 1974); *Natural Resources Defense Council* v. *Environmental Protection Agency*, 484 F.2d 1331, 1338 n. 7 (1st Cir. 1973); *Wilderness Society* v. *Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *cert. granted sub nom., Alyeska Pipeline Service* v. *Wilderness Society*, No. 73-1977. See also, *Lea* v. *Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971).[1] Only last term, this Court affirmed an

[1] Three district courts have also rejected this argument. *Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 98 n. 6 (N.D. Calif. 1972); *Stephens* v. *Dobs, Inc.*, 373 F. Supp. 618, 621 (E.D. N. Car. 1974); Two district court opinions denying counsel fees on this ground were reversed by the Fifth Circuit. See, *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), reversing an unreported decision in the Eastern District of Louisiana (West, J.); and *Fairley* v. *Patterson*, 493 F.2d 598 (5th Cir. 1974), reversing an unreported decision in the Southern District of Mississippi (Cox, J.).

award of counsel fees to a charitable organization and private counsel associated with it. *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974).

Petitioner urges first that an award of counsel fees is impermissible in this case because the plaintiffs are charitable organizations whose goals include the protection of the environment through litigation. This argument misconceives the purpose of a private attorney general rule. That rule was not fashioned to give potential plaintiffs a greater financial interest in litigation; any fees awarded are paid, not to the party itself, but to its counsel. The Wilderness Society interest in clean air or the protection of endangered species is certainly no greater than the interest of a black child in attending an integrated school. See, *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). Counsel fees are necessary to make possible the prosecution of litigation such as this where there is no realistic chance of monetary damages out of which a fee might be paid. See, *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). Petitioner does not suggest that charitable organizations in general, or the Wilderness Society in particular, have such vast resources as to be able to hire counsel to bring every public interest law suit in which they have a substantial interest. On the contrary, it is undisputed that, even in the instant case, plaintiffs were represented not by hired counsel, but by attorneys who undertook to do so without charge.

Petitioner argues in the alternative that counsel fees are inappropriate because in the instant case plaintiffs' counsel were provided by another charitable organization, the Center for Law and Social Policy. An award of counsel fees is not inappropriate merely because an organization such as the Center is interested in providing counsel in cases such as this. The practical problem confronting such

an organization is the same as that which confronts private counsel; it has severely limited resources available to expend on non-fee generating litigation. Attorneys' fees are provided, not merely to encourage such organizations to provide counsel in litigation of public importance, but also to augment their ability to do so. The fact that an organization, like a private attorney, might undertake to support a few such cases out of its own resources does not militate against awarding counsel fees to permit it to undertake more.

The ancillary benefits of the private attorney general rule are equally applicable to litigation involving charitable organizations. The rule encourages counsel to pick out from among possible *pro bono* activities those matters of significant importance. Thus, such an organization has an incentive to devote its limited resources to litigation affecting large numbers of people, not merely a handful of individual members. Ordinarily, a potential plaintiff, or an unpaid counsel, would be reluctant to undertake an action against multi-million dollar plaintiffs that can afford to wear them down through protracted litigation; the private attorney general rule tends to mitigate this problem in litigation of public importance.

Petitioner invites the Court to speculate that the existing incentives and resources available to charitable organizations are such as to make unnecessary the additional incentives and resources provided by the private attorney general rule. In fact, the handful of such organizations that exist can support only a small number of cases, compared to the many thousands of employers, industrial plants, or school districts that may be involved in violations of the law. The practical experience of these organizations is that they handle no more than a fraction of the most important problems needing attention. It would be in-

appropriate for this Court to restrict the award of counsel fees to charitable organizations based on conjecture as to how much money these organizations can raise through contributions or foundation grants, how much litigation those funds can effectively support, and how those factors will be affected in the future by such imponderables as inflation, recession, and the fluctuations of the stock market. See, *La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 98 n.6 (N.D. Calif. 1972).

The vitality of the private attorney general rule as an aid to civil rights litigation would be largely vitiated by the limitations urged by Petitioner. Despite the express Congressional sanction for counsel fees in such areas as employment discrimination, school desegregation, public accommodations, and housing, and notwithstanding this Court's liberal construction of those provisions,[2] the bulk of the litigation in such cases has continued to be brought by, or with the support of, a handful of civil rights organizations. The same is true of civil rights litigation falling under the equitable private attorney general rule. This pattern reflects the unwillingness of many attorneys, especially in the South, to undertake such litigation, the inability of most small practitioners to absorb the substantial day-to-day costs of such cases, and the essential expertise of those organizations. Not coincidentally, most of the cases in which defendants have opposed an award of counsel fees on the ground now urged by Petitioner have been civil rights cases brought by either the NAACP Legal Defense Fund or the Lawyers Committee for Civil Rights Under Law.[3] To a substantial extent, such organiza-

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[2] *Newman* v. *Piggie Park Enterprises, supra; Northcross* v. *Board of Education of Memphis City Schools*, 412 U.S. 427 (1973).

[3] See, *Fairley* v. *Patterson, supra*, (Lawyers' Committee); *Miller* v. *Amusement Enterprises, supra*, (Legal Defense Fund);

tions have committed themselves to the support of particular cases and a volume of litigation on the assumption that they will be eligible for awards of counsel fees in the same circumstances as would private counsel.

Finally, the rule urged by Petitioner raises constitutional problems of considerable magnitude. A citizen aggrieved by a violation of his legal rights may often conclude that the most efficacious method of vindicating those rights is not through individual litigation, but through membership in an organization which engages in such litigation for or on behalf of its members. As this Court noted in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 429 (1963):

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.

To cut off the possibility of counsel fees, and thus in many cases the possibility of obtaining the assistance of an attorney, merely because individuals seek to act through membership in such organizations, would impose an impermissible burden on the exercise of First Amendment rights. Similarly, an individual may legitimately prefer to be represented by counsel employed by or associated with a charitable organization. Such counsel may have greater expertise, a keener interest in the case, or a greater immunity from the pressures often brought to bear on counsel

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Lea v. *Cone Mills, supra,* (Legal Defense Fund); *Clark* v. *American Marine, supra,* (Legal Defense Fund); *Stephens* v. *Dobbs, Inc., supra,* (Legal Defense Fund); *Thompson* v. *Madison County Board of Education*, 496 F.2d 682 (5th Cir. 1974) (Lawyers' Committee); *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) (Legal Defense Fund).

handling unpopular cases. To restrict an individual's ability to obtain such representation by limiting awards of counsel fees to attorneys the individual does not want or trust would present an unwarranted interference with the individual's right to the assistance of counsel of his or her choice. See, *Sanders* v. *Russell*, 401 F.2d 241, 244-47 (5th Cir. 1968); *Fairley* v. *Patterson*, 493 F.2d 598, 607 n. 14 (5th Cir. 1974). Thus, the acceptance of Petitioners' argument would result in, in practical effect, the undermining of the entire purpose of the private attorney general rule.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.[4]

Respectfully submitted,

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[4] *Amicus* feels that it should call to the Court's attention an alternative basis for upholding an award of counsel fees to the Respondents, although one that would not result in their being assessed against the Petitioner. Both the parties and the court of appeals assumed throughout this aspect of the litigation that the United States is not liable for an award of counsel fees because of sovereign immunity or the provisions of 28 U.S.C. § 2412. The correctness of this assumption is challenged in *Pyramid Lake Piute Tribe* v. *Morton*, No. 74-342. That limitation applies only to an award of counsel fees directly from the Treasury, and would not bear on the propriety of such an award from a fund created by private litigation and payable to the United States. See, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). In the instant case, plaintiffs succeeded in compelling petitioner to seek approval of the Trans-Alaska Pipeline from Congress, and Congress in turn required as a condition of that approval that Petitioner pay to the United States a sum equal to the fair market value of the right of way on which the pipeline is constructed. This sum will doubtless involve several millions of dollars, and would not have been payable to the United States had not the plaintiffs successfully prosecuted the instant litigation. *Amicus* would suggest that plaintiffs' counsel fee might properly be deducted from this sum, and if this were done, the Court need not reach the issues presented by Petitioner.